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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. **475**

FRANK R. FRANKO, *Petitioner,*

v.

MAHONING COUNTY BAR ASSOCIATION, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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October 28, 1958.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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FRANK R. FRANKO, *Petitioner,*

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MAHONING COUNTY BAR ASSOCIATION, *Respondent:*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio entered in the above-entitled case on May 28, 1958.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of Ohio, dated May 28, 1958, is reported at 168 Ohio St. 17, 151 N. E. 2d 17, and is reprinted in the Appendix hereto, pp. 1a-25a, *infra.*

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on May 28, 1958, and a timely application for rehearing was denied on July 2, 1958. On September 3, 1958, Mr. Justice Burton signed an order extending the time for filing this petition for writ of certiorari to and including October 30, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3), since the validity of a Rule of Practice of the Supreme Court of Ohio (Rule XXVII) on grounds of repugnancy to the Constitution of the United States is drawn in question.

QUESTION PRESENTED

Whether the due process clause of the Fourteenth Amendment of the Constitution of the United States outlaws a rule of practice, adopted by a state supreme court for use in state disbarment proceedings, whereby the tribunal that ultimately decides all factual issues and imposes the appropriate penalty is deprived, in a case where facts are in dispute and credibility of witnesses is decisive, of the findings of fact and recommendations of those who actually heard the conflicting testimony of the witnesses and who formed impressions as to the credibility and weight to be attached to that testimony.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourteenth Amendment to Constitution of the United States:

> No state shall . . . deprive any person of life, liberty, or property without due process of law . . .

Rule XXVII of the Supreme Court of Ohio:

* * *

(10) HEARING BY PANEL OF THREE COMMISSIONERS. After Respondent's answer has been filed, or the time has expired within which Respondent was required to file such answer, a formal hearing shall be held, upon reasonable notice, by a panel of Commissioners appointed by the Chairman of said Board of Commissioners, who shall designate one member of such panel as chairman of the panel. Such panel shall consist of three (3) Commissioners, no one of whom shall be a resident of the district from which such complaint originated. A majority of such panel shall constitute a quorum for all purposes.

* * *

(13) PUBLIC REPRIMAND; SUSPENSION OR PERMANENT DISBARMENT; DUTY OF PANEL. If the panel finds and determines that the Respondent is guilty of misconduct and that public reprimand, indefinite suspension, or permanent disbarment is merited, the panel shall make its certified report of the proceedings before it, including its findings of fact and recommendations, and shall file the same, together with the transcript of testimony taken and an itemized statement of the actual and necessary expenses incurred in connection with such proceedings, with the Secretary of the Board of Commissioners.

(14) REVIEW BY ENTIRE BOARD OF COMMISSIONERS; BOARD TO ADMINISTER PRIVATE REPRIMAND. Upon review, said Board of Commissioners may refer the matter back to the panel for further hearing or may order a further hearing to be presented before said Board of Commissioners or may proceed upon the certified report of the prior proceedings before the panel. Upon the final review, the Board of Commissioners may dismiss the complaint or find that the Respondent is

guilty of misconduct. If the Board of Commissioners determines that a private reprimand shall be administered it shall administer such private reprimand. If the complaint is dismissed, or a private reprimand is administered, such action shall be reported to the Secretary of the Board of Commissioners, who shall notify the same persons and organizations that would have received notice if the complaint had been dismissed by the panel that heard the matter.

(15) PUBLIC REPRIMAND; SUSPENSION OR PERMANENT DISBARMENT; DUTY OF BOARD AFTER REVIEW. If the Board of Commissioners determines that a public reprimand, suspension for an indefinite period from the practice of law or permanent disbarment is merited, said Board of Commissioners shall thereupon make a final certified report of such proceedings, including its findings of fact and recommenadtions, and shall file the same, together with the transcript of testimony taken and an itemized statement of the actual and necessary expenses incurred in connection with such proceedings, in the office of the Clerk of this Court, and shall forthwith notify the Respondent and all counsel of record of such action, enclosing with such notice a copy of the findings of fact and recommendations and a copy of the statement of the actual and necessary expenses incurred.

* * *

STATEMENT OF THE CASE

Petitioner assumed his duties as Judge of the Municipal Court of the City of Youngstown, Ohio, on January 2, 1954, having been duly elected to that position for a six-year term. He has discharged the duties of that office continuously since that date. R. 259-260. He was admitted to the practice of law in Ohio in 1945 and actively practiced for seven or eight years prior to becoming judge. R. 339.

Acting pursuant to the procedure established by Rule XXVII of the Supreme Court of Ohio, the respondent Mahoning County Bar Association on May 27, 1957, filed a complaint against petitioner with the seventeen-man Board of Commissioners on Grievances and Discipline.[1] The complaint (R. 6-10, 29-32) alleged that during the time the petitioner had held his judicial position he had violated the Canons of Judicial Ethics as adopted by the Supreme Court of Ohio on January 1, 1957, and that disciplinary action should be taken by the Board and the Supreme Court in accordance with Rule XXVII. The specific charges of misconduct against the petitioner all involved incidents occurring in 1956 prior to the adoption of Rule XXVII on January 1, 1957, and were specified as follows:

1. Petitioner was allegedly guilty of misconduct in judicial office in that he did not follow the mandate of a state statute (Ohio Rev. Code § 4507.15) by noting traffic offenses on the reverse side of the driver's licenses of motorists convicted in traffic court of traffic violations other than parking violations. This misconduct, it was alleged, was motivated by a desire to promote petitioner's political career. R. 6-7, 29.

2. Petitioner was allegedly guilty of further misconduct in office in that he did not resign his judicial office when he became an independent candidate for

[1] Section 1 of Rule XXVII provides that the Board of Commissioners is created as Commissioners of the Supreme Court of Ohio with power to receive, entertain, inquire into, take proofs, make findings and submit recommendations to the Supreme Court concerning, *inter alia*, "complaints of misconduct as hereinafter defined which are alleged to have been committed by any attorney or counselor at law or judge."

the office of Prosecuting Attorney of Mahoning County, Ohio, at the general election in November of 1956. It was also alleged that he "used the power, prestige and the influence of his judicial position to promote his candidacy." R. 7, 30.

3. Additional misconduct in office was charged in that petitioner "nullified and voided parking violation charges involving the illegal parking of his own automobile" between April 4, 1956, and November 5, 1956, the period of his campaign for the office of Prosecutor. R. 9, 32.

4. A fourth charge of misconduct was added, over petitioner's strenuous objections (R. 261-270), during the course of the hearings before the three-member panel of the Board. This amendment charged that petitioner, as judge, issued a subpoena in a particular traffic case (involving one George Chappel) during the month of June, 1956, when he knew that the witness was out of the state. The witness was a member of the police force and had been the subject of newspaper publicity in connection with his absence from the city. It was alleged that petitioner issued the summons not to obtain testimony but to secure favorable newspaper publicity for himself in his campaign for the office of Prosecutor. R. 8, 30-31.

Petitioner filed an answer to the complaint, denying each count. R. 11, 38-39. The answer further claimed that the proceedings "are without legality" and asserted that the proceedings had been instituted for political rather than disciplinary purposes. R. 11, 39.

A hearing on the issues thus raised was held before a three-member panel of the Board on July 29, 30 and 31, 1957. R. 17-502. In accordance with Section 10 of

Rule XXVII, the Hearing Panel consisted of three Commissioners, no one of whom was a resident of the Youngstown district or area.

The testimony presented at the hearing, which was made public at petitioner's request, was sharply conflicting and many of the conclusions to be reached depended upon the weight and credibility to be given to the testimony of the various witnesses. Petitioner made numerous legal and evidentiary objections, most of which were taken under advisement and never formally resolved. One objection that was denied on the record, however, was petitioner's complaint (R. 57) that it was beyond the province of the panel to inquire into the charges insofar as they involved acts of judicial discretion by petitioner in his capacity as a judge. R. 66. Petitioner's counsel renewed this objection in the closing oral argument to the panel. R. 486.

At the close of the hearing, the chairman of the panel announced (R. 501) that the panel would "take the matter under consideration, as provided by Rule XXVII, and we will report the decision, the decision and the recommendation." A brief was thereafter filed by petitioner with the panel, with enough copies supplied for distribution to the entire seventeen members of the Board of Commissioners on Grievances and Discipline.

Under Section 13 of Rule XXVII, if the panel determined that petitioner was guilty of misconduct and that a public reprimand, indefinite suspension or permanent disbarment was merited, the panel was obligated to "make its certified report of the proceedings before it, including its findings of fact and recommendations, and . . . file the same, together with the transcript of testimony taken . . . with the Secre-

tary of the Board of Commissioners." But no provision is made in Rule XXVII for revealing to the individual involved the panel's findings and recommendations. And no such revelation was in fact made to the petitioner in this case. Those findings and recomendations must have been adverse, however, for otherwise the full Board would not have had occasion to consider the matter as it did pursuant to Section 14 of Rule XXVII.

Under Section 14, once the panel rendered adverse findings and recommendations, the full Board had discretion (1) to send the matter back to the panel for further hearing, (2) to order a further hearing before the full Board, or (3) to proceed upon the certified report of the prior proceedings before the panel. In this case, the Board chose the third course of action, without affording petitioner any opportunity for further hearing or argument. The nature and extent of the Board's deliberations are not known.

On October 22, 1957, the full Board issued its findings and recommendations and filed a final certified report of the proceedings with the Clerk of the Supreme Court of Ohio. R. 12-14. The findings and recommendations were prefaced by the Statement (R. 12) that this matter had come on for consideration by the Board "on the pleadings, the transcript of the proceedings before the Hearing Panel, the exhibits the briefs of counsel, and on the Hearing Panel's findings of fact and recommendations." The Board thereupon made its own findings which, in substance, supported the original charges. No mention was made, however, of any facts in relation to the additional charge concerning the issuance of a subpoena in the Chappel traffic case.

The Board's determination was that petitioner was guilty of misconduct as defined in Section 5 of Rule XXVII.[2] The recommendation was that petitioner "should be suspended for an indefinite period from the practice of law pursuant to Section 6(b) of Rule XXVII on Disciplinary Procedure of the Supreme Court of Ohio." R. 13-14.

Thereafter, on November 12, 1957, petitioner filed in the Supreme Court of Ohio objections to the full Board's findings and recommendations. R. 15-16. Among those objections was the claim (R. 15) that Rule XXVII was "unconstitutional and void because it violates due process in that it does not guarantee to respondent a hearing before this Court."[3] It was also claimed that the Board erred in attempting to review judicial discretionary acts of the petitioner (R. 16).

Briefs were submitted to the Supreme Court of Ohio and oral argument was held on these objections before that tribunal. This hearing occurred only because the Supreme Court, in its discretion, requested

[2] Section 5 defines misconduct to mean "any violation of any provision of the oath of office taken upon admission to practice of law in this state, or any violation of the Canons of Professional Ethics or the Canons of Judicial Ethics as adopted by this Court from time to time, or the commission or conviction of a crime involving moral turpitude."

[3] This contention was advanced in terms of the due process clause of the Fourteenth Amendment of the Federal Constitution. Thus at pp. 10-11 of his brief in support of the objections, petitioner averred that "To deprive a duly admitted attorney of law of his valuable right of his license to practice law without a hearing, [before the Supreme Court], we submit, violates the due process and equal protection of the laws—clauses of the Fourteenth Amendment to the Constitution of the United States."

it pursuant to Section 19 of Rule XXVII.[1] Because of the failure of the full Board to make any mention of the Chappel case subpoena incident and because the respondent Bar Association took no exception to that failure, the briefs and arguments before the Supreme Court made no mention of that incident.

The Supreme Court of Ohio confirmed the report of the full Board of Commissioners and ordered that the petitioner be indefinitely suspended from the practice of law and his name was ordered stricken from the Journal and the Roll of Attorneys kept by the Clerk of that Court. R. 503-530; Appendix hereto, pp. 1a-25a, *infra*. In the course of its opinion, the Supreme Court dismissed petitioner's contention that the absence of a hearing before the Supreme Court deprived him of due process of law as guaranteed by the Constitution of the United States by ruling that "the fact that respondent [petitioner] had a hearing before this court precludes him from questioning the constitutionality of a rule which has not operated unconstitutionally upon him." R. 506; Appendix hereto, p. 4a, *infra*.

The Supreme Court also discussed at length the Chappel case incident and relied upon it in reaching its judgment. The court remarked that "the facts regarding this episode disclose a judge more interested in obtaining personal publicity at the expense of someone else's reputation, by capitalizing on a newsworthy issue, than one truly interested in the efficient dispensing of justice." R. 525; Appendix hereto, p. 21a, *infra*. No mention was made of the fact that this

[1] Section 19 of Rule XXVII provides in pertinent part that "after hearing, *if requested by this Court*, this Court shall enter such order upon the matter as it may find proper . . ." [Emphasis added.]

incident was omitted from the findings of the Board of Commissioners. The Supreme Court, in addition, overruled the contention that it was improper to inquire into petitioner's acts of judicial discretion by holding that petitioner had abused the meaning of the term "judicial discretion" by directing the exercise of such discretion toward the furtherance of his general political ambitions rather than to the administration of impartial justice.

A timely application for rehearing was denied on July 2, 1958. R. 3. Objection was made in that application (R. 544) to the Supreme Court's consideration of the Chappel case subpoena incident in light of the failure of the Board of Commissioners to make findings thereon. Objection was also made in the application (R. 536-540) to the *ex post facto* applications of Rule XXVII to events occuring prior to the adoption of that rule, citing Article 1, Section 10, of the Federal Constitution.

On September 3, 1958, Mr. Justice Burton extended the time in which to file this petition for a writ of certiorari to and including October 30, 1958.

REASONS FOR GRANTING THE WRIT

1. Rule XXVII of the Supreme Court of Ohio, Applied Below so as to Destroy the Availability of the Findings of the Three-Member Panel That Conducted the Hearing, Raises a Procedural Due Process Question Under the Fourteenth Amendment That Is Both Important and Novel

It is concededly not the function of this Court to sit in judgment on the merits of petitioner's ouster from the bar of Ohio. *Theard* v. *United States*, 354 U.S. 278, 281 (1957); *Selling* v. *Radford*, 243 U.S. 43, 50 (1917). The creation and application of standards

relative to the admission to, or suspension from, the practice of law before the courts of a particular state are matters peculiarly within the exclusive realm of state power.

At the same time, however, a state cannot so exercise this great power in "an arbitrary or discriminatory manner." *Konigsberg* v. *State Bar*, 353 U.S. 252, 273 (1957). "A State cannot exclude a person from the practice of law or from any other occupation in a manner that contravenes the Due Process or Equal Protection Clause of the Fourteenth Amendment." *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 238-9 (1957). Thus this Court has recognized that a state court judgment of disbarment must be accorded conclusive effect as regards suspension from the state bar unless it appears "from an intrinsic consideration of the state record" that "the state procedure, from want of notice or opportunity to be heard, was wanting in due process." *Selling* v. *Radford*, *supra*, 51. See also *In re Noell*, 93 F. 2d 5 (C.A. 8, 1937).[5]

In this case, petitioner made a timely challenge in federal due process terms to the disbarment procedure established by Rule XXVII of the Supreme Court of Ohio. He objected that Rule XXVII violated due process in its failure to guarantee him a hearing before the Supreme Court. The court's answer was that he was precluded from raising such an issue since he had in fact had a hearing before that tribunal.

[5] In the *Noell* case, the court made "an intrinsic examination of the procedure followed by the state court" and concluded "the requirements of due process" had not been adequately met in the disbarment proceedings in the Missouri courts since the St. Louis Court of Appeals "at no time afforded the respondent an opportunity to be heard before it upon the merits of the controversy which it alone had power to determine."

But no amount of briefing or oral argument before the Supreme Court of Ohio could provide the full *de novo* hearing, with examination and cross-examination of witnesses, which was essential if the due process defect of Rule XXVII was to be overcome.[6] That defect was written into the Rule itself and the unfair procedure thereby established was applied to and imposed upon the petitioner in this instance. And it was a defect which prevented a full and fair record from being available to the Supreme Court of Ohio when it considered petitioner's objections to the findings and recommendations of the full seventeen-man Board of Commissioners on Grievances and Discipline.

It was constitutionally proper, of course, for the Supreme Court of Ohio to delegate to the Board of Commissioners its powers to provide notice and a hearing, to take evidence, to make findings of fact and to formulate recommendations as to discipline. *McVicar v. State Board of Law Examiners*, 6 F. 2d 33 (D. C. Wash., 1925); *In re Edwards*, 45 Idaho 676, 266 P. 665 (1928); *In re Kenner*, 178 La. 774, 152 So. 520 (1934); *In re Hadwinger*, 167 Okla. 307, 27 P. 2d 604 (1933). Such delegation is simply an application of the time-honored, judicial practice of referring fact-finding tasks to masters or referees. The Supreme Court itself, by virtue of Rule XXVII, retains the power to

[6] Moreover, the hearing provided by the Supreme Court was granted in its discretion and not as a matter of right. See footnote 4, *supra*. This Court has held that "extra-official or casual notice, or a hearing granted as a matter of favor or discretion, [cannot] be deemed a substantial substitute for the due process of law that the Constitution requires. . . . This notice [and hearing] must be provided as an essential part of the statutory provision, and not awarded as a mere matter of favor or grace." *Coe v. Armour Fertilizer Works*, 237 U.S. 413, 424-425 (1915).

review the proceedings before the Board of Commissioners and to make all ultimate determinations.

Petitioner asserts, however, that Rule XXVII is constitutionally defective in its explicit failure to provide that the factual findings and the recommendations of those who actually conducted the hearing be made available both to the petitioner and to the Supreme Court of Ohio. Under Rule XXVII, the following procedural events occurred with reference to those findings and recommendations:

(1) The panel of three Commissioners who conducted the hearing was required to and did make findings of fact and recommendations. Section 13 of Rule XXVII. These findings and recommendations were never made available to the petitioner and are not part of the record in this case.

(2) The panel's findings and recommendations apparently were reported to the full Board of Commissioners, as required by Section 13 of Rule XXVII.

(3) The full seventeen-member Board of Commissioners issued entirely separate and distinct findings and recommendations of its own, prefacing them with the statement that the matter came on for consideration "on the pleadings, the transcript of the proceedings before the Hearing Panel, the exhibits, the briefs of counsel, and on the Hearing Panel's findings of fact and recommendations." R. 12; Section 14 of Rule XXVII.

(4) The full Board's findings and recommendations were then certified and reported to the Supreme Court of Ohio. Those were the only findings and recommendations which that Supreme Court had before it in making the final resolution of the disbar-

ment issues. Nothing in Rule XXVII requires or even permits the transmittal of the Hearing Panel's findings and recommendations to the Supreme Court.

It is thus apparent that the Rule XXVII procedure resulted in substituting the findings of the full seventeen-man Board of Commissioners for those of the three-man Hearing Panel. This substitution process was so secret and uncontrolled that neither the petitioner nor the Supreme Court of Ohio can at any point determine the nature, content or unanimity of the findings and recommendations of the Hearing Panel. No one can say on the basis of the record whether the Hearing Panel made certain findings favorable to the petitioner or whether the Board of Commissioners altered, omitted or overruled any such favorable findings. Nor can it be determined whether one of the Hearing Panel members may have dissented in favor of the petitioner.[7]

The importance of the original, undiluted findings and impressions of the three Commissioners who attended the hearing and saw the witnesses is plainly evident. The evidence here was far more than documentary in nature. There were many witnesses. And there were sharp conflicts in their testimony on various critical points. Their credibility, or lack of it, be-

[7] In *Ayrshire Collieries Corp.* v. *United States*, 331 U.S. 132, 139 (1947), this Court pointed out that where one of three judges of a court did not participate in a decision "we cannot say that the failure of the third judge to participate in the determination of a case, where the other two are in agreement as to the result, is without significance. The decision reached by two judges is not necessarily the one which might have been reached had they the benefit of the views and conclusions of the third judge. And *should the latter have publicly indicated an opinion differing from that of his colleagues, his position might be helpful to the litigants and to this Court if the case were appealed.*" (Emphasis added)

came of paramount significance in resolving these factual disputes. The impressions created by the petitioner's own testimony, for example, were largely decisive of the weight to be given to his protestations of judicial discretion in defense against certain alleged wrong-doings.

Thus the opinions and impressions of those who personally heard and saw the witnesses while testifying became of critical significance in the fair formulation of the ultimate findings and conclusions by the Supreme Court of Ohio. "[W]here weight and credibility [are] given to testimony of witnesses, the litigants are entitled to have the person who conducts the hearing and sees the witnesses to at least have his conclusions and impressions reported to the fact-finding body." *Radaca* v. *United States Smelting Co.*, 62 Ariz. 464, 470, 158 P. 2d 540, 542 (1945). As has been said by an outstanding authority on administrative law and procedure, "whenever the demeanor of witnesses is a substantial factor, making a decision without having a report from the hearing officer is undesirable and in some cases may be deemed by the reviewing court a denial of a fair hearing." Davis, Administrative Law, § 102, p. 339 (1951).

In short, due process of law in this context requires an affirmative showing "that the one who finds the facts had access to the benefit of [the] findings, conclusions and impressions" of "the person who conducts the hearing, hears the testimony, and sees the witnesses while testifying." *Crow* v. *Industrial Commission*, 104 Utah 333, 336, 140 P. 2d 321, 322 (1943).[8]

[8] In *Farran* v. *Curtis Pub. Co.*, 276 Pa. 553, 120 A. 544 (1923), it was said: "When facts are required to be found . . . it is especially advisable that the commissioner who presides at the

He who hears need not necessarily decide but if he does decide then the one who makes the ultimate determinations must have the benefit of that decision. Cf. *United States* v. *Morgan*, 298 U.S. 468, 481 (1936).

It is true, of course, that due process under the Federal Constitution does not necessarily require that the judge or court rendering the ultimate findings and conclusions actually see and hear the witnesses testify and observe their demeanor. *Geo. S. Bush & Co.* v. *United States*, 135 F. Supp. 696, 707 (Cust. Ct., 1949).[9] Nor does due process forbid a tribunal from hearing a cause on a transcript of evidence taken earlier before another court or judge. *De La Rama* v. *De La Rama*, 241 U.S. 154, 158-159 (1916).

And so in this case it would not have been constitutionally wrong for Rule XXVII to have provided that the Hearing Panel Commissioners shall issue no findings or recommendations and that the Supreme Court shall determine the matter solely on the basis of the written record. But that is not to say that a requirement, such as contained in Rule XXVII, that those who actually hear the evidence must issue findings and recommendations may be applied in an unfair or discriminatory manner. See *Griffin* v. *Illi-*

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hearing and sees the witnesses and hears them testify should find the facts. He is much better fitted to give proper effect to the testimony than one who has before him merely the typewritten copy of the evidence." See also *United States* v. *Nugent*, 100 F. 2d 215, 217 (C.A. 6, 1938); *United States ex rel. Ohm* v. *Perkins*, 79 F. 2d 533 (C.A. 2, 1935).

[9] See also *S. J. Charia & Co.* v. *United States*, 43 C.C.P.A. Customs 147, 151-152 (1956). Cf. *United States* v. *Nugent*, 100 F. 2d 215, 217 (C.A. 6, 1938).

nois, 351 U.S. 12, 18 (1955).[10] Findings by the Hearing Panel Commissioners having been made an integral part of Ohio disbarment proceedings, the due process clause of the Federal Constitution requires that those findings—in the context of a factually-disputed case—be made available to the ultimate fact-finding tribunal so that the petitioner will not be unfairly deprived of whatever benefits such findings might contain.

Here the record and Rule XXVII demonstrate that the Supreme Court of Ohio—the tribunal that made the ultimate findings and conclusions[11]—did not have access to the findings and recommendations of the Hearing Panel of three Commissioners who were the only ones to hear and observe the witnesses and who were required to make such findings and recommendations. The availability of those findings and recommendations was destroyed by Rule XXVII in its substitution of the findings of the seventeen-man Board (fourteen of whom had never seen or heard the witnesses) for the findings of the three-man Hearing Panel. That substitution made the task of the Supreme Court more

[10] In the *Griffin* case it was said: "It is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all. . . . But that is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty."

[11] The fact-finding function of the Supreme Court is dramatically illustrated by its findings and discussion of the Chappel case subpoena incident. That incident was not the subject of any of the findings of the full Board of Commissioners, yet the Supreme Court felt itself free to make its own findings in that respect despite the fact that petitioner was misled by the Board's findings into the belief that the Chappel case incident was no longer in issue.

hazardous and its conclusions less trustworthy. The court was forced to guess from the written record as to the credibility to be attached to the oral testimony of the witnesses; it had no way whatever of knowing the impact of such testimony on those who actually heard it. And the petitioner was effectively deprived of the benefit of any favorable findings or impressions that the Hearing Panel might have expressed, or that a possible dissenting Commissioner might have voiced.[12]

Thus a procedural due process question of great importance is raised by the ruling below. It is important not only to the petitioner in his struggle to preserve his professional career but to the development of the due process concepts of the Fourteenth Amendment. The right to a full and fair hearing and determination, particularly as to one's privilege to remain a member of the legal profession, is too valuable a right to permit either subtle or crude erosions. Rule XXVII of the Supreme Court of Ohio represents a subtle erosion of that right. As such, it deserves full review and consideration by this Court.

Moreover, Rule XXVII represents a new and growing trend in the technique of state disbarment procedures. Disbarment proceedings are occurring with increasing frequency. The problem raised by Rule XXVII is therefore of a recurring nature, one that needs definitive resolution by this Court so that the unfairness that may adhere to the procedure may be

[12] Conceivably, the Hearing Panel made findings as to the Chappel case incident that favored petitioner, thereby influencing the full Board to disregard the matter. Had the Supreme Court of Ohio had the benefit of such Hearing Panel findings its treatment of the matter and possibly its determination of the penalty to be imposed might have been different.

eradicated before more individuals suffer the ill-effects of that unfairness. The absence of any prior ruling by this Court on this matter augments the need and desirability of the grant of certiorari in this case.

2. The Decision Below, Rendered Pursuant to Rule XXVII Without Benefit of the Findings of Those Who Heard and Saw the Witnesses, is in Direct Conflict With the Principle Established in Crow v. Industrial Commission, 104 Utah 333, and Radaca v. United States Smelting Co., 62 Ariz. 464

Highlighting the appropriateness of the grant of certiorari in this case is the fact that the decision below, grounded on the procedure created by Rule XXVII, directly conflicts with the due process principle that the one who makes the ultimate determination of the facts must have access to the findings and recommendations of the one who conducted the hearing, heard the testimony and saw the witnesses while testifying. That principle has been most fully developed by the Supreme Courts of Utah and Arizona in the respective cases of *Crow* v. *Industrial Commission*, 104 Utah 333, 140 P. 2d 321 (1943), and *Radaca* v. *United States Smelting Co.*, 62 Ariz. 464, 158 P. 2d 540 (1945). And a well-recognized basis for the grant of certiorari is a conflict over federal constitutional issues as between the highest courts of different states.[13]

In the *Crow* case, the one Commissioner who heard the evidence and saw the demeanor of the witnesses

[13] See Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States, § 371, p. 738 (Wolfson and Kurland ed., 1951); Stern and Gressman, Supreme Court Practice, p. 141 (2d ed., 1954). An example of a grant of certiorari on this basis is to be found in *Pennsylvania ex rel. Sullivan* v. *Ashe*, 302 U.S. 51, 52 (1937).

while testifying did not participate in the decision of the Commission and he made no findings which made his opinion of the evidence available to the Commission in making its decision. The evidence was sharply contradictory and much depended upon the credibility of the witnesses. The Utah Supreme Court reversed the Commission's determination on due process grounds and held that (104 Utah at 337, 140 P. 2d at 322):

> "Where there is a conflict in the testimony, and the weight and credibility to be given testimony of the various witnesses is the determining factor, in order to accord a 'full hearing' to which all litigants are entitled, the person who conducts the hearing, hears the testimony, and sees the witnesses while testifying, whether a member of the board, or an examiner or referee, must either participate in the decision, or where, at the time the decision is rendered, he has severed his connections with the board, commission or fact finding body, the record must show affirmatively that the one who finds the facts had access to the benefit of his findings, conclusions and impressions of such testimony, by either written or oral reports thereof. This does not necessarily require that all of the commissioners must be present at the hearing, or even that the one hearing the evidence must concur in the result, but his opinion on the testimony must be available to the commission in making its decision. . . ."

Chief Justice Wolfe, concurring specially in the result, added (104 Utah at 345, 140 P. 2d at 326):

> "What is required to satisfy the demands of due process, that is, of a full or fair hearing, is that he who observes the witness and listens to the evidence must transmit his observations or conclusions to those others who, whether they are

superiors or associate members of the same agency, are to decide and this may be done in the form of tentative findings or by a report or recommendations or orally in conference."

In the *Radaca* case, the Arizona Supreme Court held that, while the demands of due process had been satisfied in the particular proceeding before it (62 Ariz. at 470, 158 P. 2d at 542),

> ". . . a fair and full hearing to litigants under the due process clause of the constitution requires that the examiner or referee who hears the evidence, where there is a sharp conflict in the testimony, must in some way participate in the decision or give his conclusions and impressions of such testimony by either written or oral reports. The basis for this is that where weight and credibility is given to testimony of witnesses, the litigants are entitled to have the person who conducts the hearing and sees the witnesses to at least have his conclusions and impressions reported to the fact-finding body. If a situation should arise where it could not be assumed that the observations and conclusions of the examiner had been communicated to the commission, and the evidence was in such conflict that the weight and credibility to be given testimony of the various witnesses was the determining factor, the due process rule might have to be applied."

The conflict between the two foregoing cases and the instant one is clear. Here the tribunal which ultimately determined the facts and imposed the penalty was deprived of the impressions and conclusions of the only three Commissioners who actually heard the witnesses. That deprivation was no less complete because the three Hearing Panel Commissioners also participated in the findings of the full

Board. There is nothing to indicate that the full Board's findings were identical with those of the Hearing Panel. For aught that appears, the fourteen members of the Board who did not participate in the hearing may have insisted that significant alterations, omissions or additions be made in the Hearing Panel's findings; or entirely new and different ones may have been written.

In any event, the Supreme Court of Ohio was effectively denied the benefit of the undiluted findings of the Hearing Panel by operation of Rule XXVII. In that denial lies the clear conflict with the principle enunciated in the *Crow* and *Radaca* cases.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari to the Supreme Court of Ohio should be granted.

Respectfully submitted

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October 28, 1958.